

STATE OF MICHIGAN
COURT OF APPEALS

ANILA MUCI,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION

July 21, 2005

9:00 a.m.

No. 251438

Wayne Circuit Court

LC No. 03-304534-NF

Official Reported Version

Before: Saad, P.J., and Fitzgerald and Smolenski, JJ.

SAAD, P.J., (*dissenting*).

I respectfully dissent because Michigan's no-fault law should govern a no-fault insurer's statutory right to have a claimant submit to a medical examination. Under the Legislature's comprehensive and detailed framework for medical examinations, an insured must submit to a mental or physical examination required by the insurer as a condition of payment of a claim for benefits, and the insurer is statutorily permitted to make reasonable provisions for such examinations. MCL 500.3151. The insurer's right to this examination does not depend on whether an insured has filed a lawsuit for failure to pay. In other words, regardless of whether litigation has commenced, a claimant remains obligated to submit to a medical examination if the claimant's condition is material to a claim for past or future personal injury protection (PIP) benefits.¹

¹ Indeed, under MCL 500.3142(2), the claimant is obligated to provide "reasonable proof of the fact and of the amount of loss sustained." Consistently with this section, the necessity of the medical examination directly relates to whether plaintiff can establish reasonable proof of the fact and amount of loss. Though plaintiff may have undergone examinations by her own doctors, an insurer is entitled under § 3151 to have a claimant submit to an independent medical examination under the reasonable provisions set forth in the insurance agreement. Contrary to the suggestion by the majority in footnote 4 of its opinion, I do not suggest that plaintiff failed to submit to any medical examinations before filing her claim. But the record is clear that plaintiff refused, and continues to refuse, to submit to a § 3151 examination without conditions—conditions that the Legislature chose not to require.

Plaintiff refused to submit to an examination required by § 3151 and demanded that the insurer stipulate certain conditions, including, among numerous other requirements, that a third party may be present during the examination, that the examination may be videotaped, and that plaintiff may not give the examining doctor an oral account of the accident or her medical history. When defendant declined to stipulate plaintiff's terms, plaintiff attempted to litigate defendant's statutory right under § 3151 by asking the court to impose her conditions on the insurer pursuant to MCR 2.311. I would hold that MCR 2.311 should not be used preemptively to circumvent our Legislature's extensive statutory scheme for dealing with medical examinations under the no-fault act.

The Legislature made the obligation to submit to a § 3151 examination unambiguous and mandatory by specifically providing that "the person shall submit" to such an examination. Moreover, unlike MCR 2.311, which conditions physical and mental examinations on a showing of "*good cause*" and allows the trial court the discretion to grant and tailor the request, the Legislature chose not to impose such conditions on the right of a no-fault carrier to require a claimant to submit to an examination. Plaintiff takes the untenable position that, if a claimant files suit, an insurer must establish "good cause" for the examination notwithstanding the Legislature's clear intent that the examination is mandatory under § 3151.

Just as the Legislature did not condition an insurer's right to medical examinations on a showing of good cause, the Legislature chose not to impose the kind of conditions required by the trial court here. Rather, the Legislature provided for remedies, as expressed in MCL 500.3153,² MCL 500.3142, and MCL 500.3148. In these remedial sections, our Legislature

² MCL 500.3153 states:

A court may make such orders in regard to the refusal to comply with sections 3151 and 3152 as are just, except that an order shall not be entered directing the arrest of a person for disobeying an order to submit to a physical or mental examination. The orders that may be made in regard to such a refusal include, but are not limited to:

(a) An order that the mental or physical condition of the disobedient person shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.

(b) An order refusing to allow the disobedient person to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.

(c) An order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it.

(continued...)

imposes penalties of twelve percent on no-fault insurers for overdue payments if the insurer refuses to pay benefits after reasonable proof of loss is submitted. And, significantly, in MCL 500.3148, our Legislature grants attorney fees to lawyers who advise and represent PIP claimants who are unreasonably denied benefits, providing that "[t]he attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." Thus, to the extent a claimant has a grievance or concern that an insurer is abusing the medical examination process simply to delay the payment of benefits, the Legislature provides substantial remedies that also constitute serious disincentives for an insurer to attempt to abuse that process.³

From the foregoing, it is clear that our Legislature dealt comprehensively with both the question of medical examinations for PIP claimants and the appropriate penalties for an insurer's unreasonable refusal to pay benefits. Therefore, if a no-fault carrier abuses its right under § 151, a trial court should use no-fault law and apply the remedies available in §§ 3153, 3142 and 3148 rather than use MCR 2.311 to impose conditions for the taking of such examinations—conditions our Legislature chose not to impose.⁴ In this manner, our courts can both honor the Legislature's role in creating rights and remedies for PIP benefits under Michigan's no-fault automobile insurance law and protect a claimant's right to PIP benefits.

/s/ Henry William Saad

(...continued)

(d) An order requiring the disobedient person to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim.

(e) An order requiring delivery of a report, in conformity with section 3152, on such terms as are just, and if a physician fails or refuses to make the report a court may exclude his testimony offered at trial.

³ Indeed, in her complaint, plaintiff sought to recover under these specific statutory remedies.

⁴ Indeed, to the contrary, under MCL 500.3151, the Legislature grants the insurer the right to make "reasonable provisions" in the policy for such examinations.